IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Petitioners,

against

LEO M. SHORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Parklane Hosiery Company, Inc. and Herbert N. Somekh pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on November 1, 1977. Petitioners' petition for rehearing and rehearing en banc was denied by orders dated December 20, 1977.

Opinions Below

The opinion of the Court of Appeals, 565 F.2d 815 (2d Cir. 1977), is annexed hereto as Appendix A, pages 1a-19a.* It reversed the order of the United States District Court for the Southern District of New York which, in upholding Petitioners' constitutional jury trial right

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* Citation herein to pages of each appendix will appear as follows: "App. , p. ".

against a claim of collateral estoppel, had denied Respondent's motion for partial summary judgment relating to the question of liability. The opinion of the District Court was not reported. It appears at App. E, p. 26a.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1977. App. B, p. 20a. The petition for rehearing and rehearing en banc was denied by orders dated December 20, 1977. App. C, p. 22a; App. D, p. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court below, in reaching a decision admittedly in conflict with that of the Court of Appeals for the Fifth Circuit in *Rachal* v. *Hill*, 435 F.2d 59 (1970), *cert. denied*, 403 U.S. 904 (1971), rule erroneously upon an important constitutional question of the right to trial by jury which has not been, but should be, decided by this Court?

2. Did the Court below err in denying Petitioners their Seventh Amendment right to a jury trial of certain issues in this action on the basis of findings made in an earlier-tried non-jury action in which the jury trial right did not exist and to which Respondent was not a party?

3. Can the constitutional jury trial right, preserved by the Seventh Amendment as that right existed in 1791, be destroyed by a post-1791 change in the common law doctrine of collateral estoppel?

4. Does the decision below conflict with the decision of this Court in *Dimick* v. *Schiedt*, 293 U.S. 474 (1935)?

5. Did the Court below err in concluding that Petitioners lost their constitutional jury trial right in this action as to those issues determined in a Securities and Exchange Commission ("SEC") enforcement action

> (a) by not requesting a jury or an advisory jury in the SEC action, notwithstanding the fact that there had never been a right to a jury trial in the SEC action and Respondent had not been a party thereto, or
>
> (b) by not seeking to have this action tried prior to the SEC action, notwithstanding the fact this action could not have been made ready for, and brought to, trial before the trial of the SEC action?

Constitutional Provision and Federal Rules Involved

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rules 39(b) and (c) of the Federal Rules of Civil Procedure provide:

> "(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its dis-

cretion upon motion may order a trial by a jury of any or all issues.

"(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

Statement of the Case

This action was commenced on November 13, 1974 by Respondent, a former shareholder of Petitioner Parklane Hosiery Company, Inc. ("Parklane"), against the two Petitioners and 12 other defendants.* The complaint alleged violations of §§ 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules thereunder and the common law.** Respondent demanded a trial by jury.

The action followed an October 1974 merger, pursuant to the laws of the State of New York, whereby Parklane was returned to its former status as a private company. The complaint, seeking damages, challenged the validity of

* The 14 defendants named in this action are listed in the caption of the opinion below. App. A, p. 1a.

** Federal jurisdiction in the court of first instance was based upon section 78aa of Title 15, United States Code, and principles of pendent jurisdiction. Section 78aa provides in pertinent part:

> "The district courts of the United States, . . . , shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

the merger and alleged that the related proxy statement dated September 24, 1974 (the "Proxy Statement") was deficient in a number of respects. The answers denied all of the material allegations of the complaint. The action was certified as a class action and the notice thereof informed the class that "[t]he complaint seeks money damages for the members of the class."

While this action was still in its pre-trial stage, the SEC, on May 5, 1976, commenced an enforcement action in the United States District Court for the Southern District of New York against the two Petitioners (the "SEC action"). The SEC simultaneously moved, by order to show cause, for the same injunctive and ancillary relief sought in its complaint. The SEC did not challenge the validity of the Parklane merger. Rather, the SEC's complaint and its motion were limited to a claim that the Proxy Statement was deficient in three respects.*

On May 20, 1976, Respondent moved to amend his complaint to include allegations of the same violations alleged in the SEC's complaint and to add a claim for rescission. While Respondent's motion to amend the complaint was pending, the trial of the SEC action was ordered to commence on June 2, 1976. The trial, to the Court alone, was concluded on June 7, 1976; decision was reserved.

* The SEC action was entitled *Securities and Exchange Commission* v. *Parklane Hosiery Co., Inc., Herbert N. Somekh,* 76 Civ. 2024 (KTD). The SEC's complaint and motion were based upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); §§ 10(b), 13(a) and 14(a) of the 1934 Act, 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a); and certain rules promulgated thereunder.

At the time the SEC action was commenced, the instant action was before District Judge Wyatt. The SEC action was assigned to District Judge Duffy. As the Court below was informed in response to its inquiry upon oral argument, Petitioners had applied in writing to Judge Duffy for reassignment of the SEC action to Judge Wyatt pursuant to the assignment rules of the District Court applicable to related cases. Petitioners' application was denied.

At the time the SEC action was commenced and tried, this action was not ready for trial. Pre-trial discovery was far from complete. While there were then outstanding notices by both sides to take certain depositions, the only discovery in this action had been the production of certain documents by Parklane.

On September 3, 1976, subsequent to the conclusion of the trial of the SEC action, Respondent's motion to amend the complaint was granted. The amended complaint, served October 1, 1976, repeated Respondent's jury demand. The answers denied all of the material allegations of the amended complaint.

On November 9, 1976, the District Court (Duffy, J.) entered an Opinion and Order in the SEC action in which it found that the Proxy Statement violated § 14(a) of the 1934 Act and Rule 14a-9 thereunder in the three respects claimed by the SEC. *Securities and Exchange Commission v. Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, *aff'd*, 558 F.2d 1083 (2d Cir. 1977).* Thereupon, Respondent, on November 24, 1976, moved for partial summary judgment against Petitioners.

Respondent's motion was based upon a contention that Petitioners were collaterally estopped in this action by the findings of fact made in the SEC action. Petitioners, contending they were not so estopped, opposed the motion on the ground (a) that, in the SEC action, they had had no right to a jury trial; (b) that, in this action, they do have a right to the jury trial which Respondent himself had

* The District Court denied all of the relief requested by the SEC except to the extent that Parklane was directed to file, and Petitioner Somekh, its president, to cause to be filed, amendments to Parklane's prior filings with the SEC to reflect the three deficiencies found in the Proxy Statement.

demanded; and (c) that Respondent, who was not a party to the SEC action, could not, through collateral estoppel, deprive Petitioners of their jury trial right in this action.

The District Court (Wyatt, J.) denied Respondent's summary judgment motion, relying upon *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), a case squarely in point. App. E, p. 26a. Respondent then moved, pursuant to 28 U.S.C. § 1292(b) and Rule 5, Fed.R.App.P., for certification of a question for appeal. The District Court granted the motion and the Court below granted the petition for leave to appeal.

The question certified was as follows:

> "Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange Commission ("SEC") can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions."

In its November 1, 1977 opinion, the Court below, deciding what it termed "the important question" raised upon the appeal (App. A, p. 2a), reversed the District Court. Expressly stating that it disagreed with the Fifth Circuit's decision in *Rachal, supra*, (App. A, p. 18a), the Court below held that Petitioners' jury trial right in this action as to issues of fact determined in the SEC action was extinguished, through collateral estoppel, on the ground that there had been a full and fair trial to the court alone in the SEC action.

The Court below also concluded that the jury trial right in this action as to those issues determined in the SEC action had been waived, though Respondent had not claimed, and the District Court had not found, any such waiver. The Court below stated that the jury trial right had been waived because Petitioners had not (a) sought to expedite the trial of this action or (b) requested the District Court to try the SEC action to a jury or before an advisory jury pursuant to Rule 39(b) or (c), Fed.R.Civ.P. App. A, p. 14a.

It is from the November 1, 1977 judgment and opinion of the Court below that Petitioners seek certiorari.

Reasons for Granting the Writ

I

The decision of the Court below is in direct conflict with the Fifth Circuit's decision in *Rachal* v. *Hill*, 435 F.2d 59 (1970), *cert. denied*, 403 U.S. 904 (1971), on the question whether the Seventh Amendment jury trial right may be extinguished, through collateral estoppel, where there is no mutuality of parties.

The decision below represents the first time a court has held that the right of trial by jury, as it existed in 1791 and was preserved by the Seventh Amendment, has been extinguished by a post-1791 change in the common law. The Court below held that Petitioners were collaterally estopped from trying to a jury in this action those issues which had been determined in the earlier-tried SEC action in which a jury trial right never existed and to which Respondent had not been a party. In so holding, the Court below relied upon the relatively recent relaxation of the requirement of mu-

tuality of estoppel* in cases where, unlike the case here, the right to a jury trial had not been in issue. App. A, p. 8a.

In thus denying Petitioners their jury trial right in this action, not only was the decision below admittedly in conflict with the Fifth Circuit's decision in *Rachal* v. *Hill*, *supra*, but it was also in conflict with the long-established principle, enunciated in *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), that a post-1791 change in the common law cannot be invoked to extinguish the Seventh Amendment jury trial right as it existed in 1791.

The Fifth Circuit, in *Rachal*, in circumstances indistinguishable from those here, had held that defendants in a private action for damages under the federal securities laws could not be deprived of their jury trial right on the basis of findings made in an earlier-tried SEC enforcement action in which there had been no jury trial right and to which the plaintiff in the private action had not been a party. But for the decision below, *Rachal* has been consistently followed. *Securities and Exchange Commission* v. *Standard Life Corp.*, 413 F. Supp. 84 (W.D. Okla. 1976); *McCook* v. *Standard Oil Corp.*, 393 F. Supp. 256 (C.D. Cal. 1975); *Cannon* v. *Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971). *See also Allegheny Airlines, Inc.* v. *United States*, 504 F.2d 104, 111 n.7 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F.2d 1177, 1184 (3d Cir. 1972); *Stewart* v. *United Australian Oil, Inc.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,019 (S.D.N.Y. 1975).

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* Mutuality of estoppel means that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320-21 (1971).

A. The conflict between the Fifth and Second Circuits rests upon conflicting interpretations of this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959).

The Second Circuit here, and the Fifth Circuit in *Rachal, supra*, arrived at their conflicting results on the basis of diametrically opposite interpretations of this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). While the *Rachal* Court found *Beacon Theatres* to exemplify this Court's great respect for the Seventh Amendment jury trial right, 435 F.2d at 64, and upheld it against collateral estoppel, the Court below thought that *Beacon Theatres* evidenced this Court's "inherent respect for the doctrine of collateral estoppel" (App. A, p. 13a) and extinguished that right. However, *Beacon Theatres* and this Court's subsequent decision in *Meeker* v. *Ambassador Oil Corp.*, 375 U.S. 160 (1963), *rev'g mem.*, 308 F.2d 875 (10th Cir. 1962), show that as between the constitutional jury trial right and the common law principle of collateral estoppel, the jury trial right is supreme.

In *Beacon Theatres, supra*, this Court held that, in a single action presenting claims for equitable and legal relief, mandamus should issue to compel a jury trial of the common issues. Since in *Beacon Theatres* there was mutuality, had the trial court, without a jury, first tried the common issues, trial of the legal claim to a jury might have been precluded. 359 U.S. at 503-04. To preserve the jury trial right against possible destruction by estoppel, this Court held that the common issues should be tried first, to a jury. *Accord, Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962).

Significantly, neither *Beacon Theatres* nor *Dairy Queen, supra*, reached the question whether the right to a jury trial of the common issues would in fact have been lost if

the equitable claims had first been tried to a court alone. That question was subsequently presented to this Court in *Meeker, supra*. The Court below, however, apparently without taking *Meeker* into account, assumed, on its reading of *Beacon Theatres*, that a prior trial of equitable claims would result in loss of the jury trial right of issues common to legal claims. App. A, pp. 10a-11a. *Meeker* disproves such an assumption and the interpretation given *Beacon Theatres* by the Court below.

In *Meeker*, plaintiffs asserted both legal and equitable claims, which presented common issues, and demanded a jury. The trial court, however, tried and determined the equitable claim -- and perforce the common issues -- adversely to plaintiffs. As a result, plaintiffs were precluded from relitigating those issues to a jury on the legal claim. Plaintiffs thereupon appealed, claiming that they had been denied their jury right. The Court of Appeals for the Tenth Circuit rejected plaintiffs' contention.* 308 F.2d at 884.

Though in *Meeker* plaintiffs had not sought mandamus to protect their jury trial right and there was no question that they had been accorded a full and fair trial by the court alone, this Court, on the basis of *Beacon Theatres* and *Dairy Queen*, reversed the Court of Appeals, and thereby preserved the jury trial right against destruction by estoppel. Plaintiffs were thereby afforded a retrial, to a jury, of the very same issues which a court had determined adversely to them.** The identical result was also reached by the Sixth Circuit in *National Union Electric Corp.* v. *Wilson*, 434 F.2d 986, 988 (1970).

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* The facts in *Meeker, supra*, are discussed in the Court of Appeals decision, 308 F.2d 875; see 5 *Moore's Federal Practice* ¶ 38.11[8.-6] at 128.13 (2d ed. 1977).

** The fact of the retrial in *Meeker* appears in the District Court Docket, Civ. No. 8212 (W.D. Okla.), and the Judgment therein filed December 14, 1965.

Thus, contrary to the decision below, it is seen from *Meeker* that where, as here and in *Rachal*, there is a right to a jury trial, that right may not be denied either (a) because a party had been "accorded a full and fair opportunity to try those issues in the prior [non-jury] proceeding" (App. A, p. 7a) or (b) to serve considerations such as finality and judicial economy. App. A, pp. 13a-14a. As *Beacon Theatres*, *Dairy Queen*, and *Meeker* show, and as the Fifth Circuit, in *Rachal*, recognized, such considerations must bow to the preservation of the jury trial right.*

The validity of the Fifth Circuit's reading of *Beacon Theatres*, as contrasted with the Second Circuit's misapprehension of that case, may also be seen in *Beacon Theatres'* reference to *Dimick* v. *Schiedt*, *supra*, which had held that the jury trial right cannot be impaired by a post-1791 change in the common law. In *Beacon Theatres*, this Court granted certiorari when, as here, the jury trial right was threatened. Repeating what it had said in *Dimick*, this Court, in *Beacon Theatres*, wrote:

> "We granted certiorari, 356 U.S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick* v. *Schiedt*, 293 U.S. 474, 486." 359 U.S. at 501.

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* The suggestion of the Court below, that where there had been a full and fair non-jury determination of certain facts in a prior action there is no genuine issue as to those facts in a second action in which there is a jury trial right (App. A, p. 9a), begs the very question of the applicability of collateral estoppel. Thus, it is only where, unlike the case here, collateral estoppel can properly be invoked that findings in one action can be applied in a second action to render a factual issue undisputed.

B. While the application of collateral estoppel, in the absence of mutuality, may be discretionary in some circumstances, the Fifth and Second Circuits are in conflict as to whether a court's discretion may be exercised to destroy a Seventh Amendment jury trial right.

The Fifth Circuit in *Rachal, supra,* and the Second Circuit in this case recognized that the requirement of mutuality of estoppel has been relaxed. They are in conflict, however, as to whether, in the absence of mutuality, a constitutional jury trial right may be destroyed through collateral estoppel. The Court below believed that as long as there had been a full and fair trial to a court alone in an action in which the jury trial right never existed, a stranger to the action could invoke collateral estoppel to destroy the jury trial right in a second action. The Fifth Circuit, to the contrary, had held that in such circumstances collateral estoppel could not be invoked and that preservation of the jury trial right was required.

According to the Fifth Circuit, the mere fact that there had been a full and fair trial is not enough to permit the application of collateral estoppel in the absence of mutuality. The Fifth Circuit, unlike the Second Circuit, held that it was also necessary to consider whether the application of collateral estoppel would result in an injustice to the party against whom it is asserted. Thus, in *Rachal*, the Fifth Circuit wrote:

> "While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case." 435 F.2d at 62. (citations omitted)

The standards for the application of collateral estoppel in the absence of mutuality so stated by the Fifth Circuit were confirmed by this Court in *Blonder-Tongue, supra.* While *Blonder-Tongue* represented the first time this Court permitted the application of collateral estoppel in the absence of mutuality, it also taught that, in the absence of mutuality, collateral estoppel depended upon considerations of "justice and equity" and could not be applied pursuant to an "automatic formula." 402 U.S. at 334. Though the Court below, in applying collateral estoppel to extinguish the jury trial right, indicated reliance upon *Blonder-Tongue* (App. A, p. 8a), it overlooked the significant fact that *Blonder-Tongue* had no occasion to consider whether, and did not suggest that, collateral estoppel would apply where, as here, a jury trial right was at stake.

Indeed, *Beacon Theatres* shows that where the exercise of discretion might affect the jury trial right, a court must, wherever possible, preserve that constitutional right. Referring to a court's discretion in setting the order of trial of legal and equitable claims, this Court, in *Beacon Theatres,* wrote:

> "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510. (footnote omitted)

That same principle was followed by the Fifth Circuit in *Rachal,* but disregarded by the Court below. The Fifth Circuit perceived the injustice of depriving the defendants in that case of the jury trial right they would have had, had the *Rachal* plaintiff been a party to the prior SEC enforcement action and had therein presented his claim for damages. The Court, in language apposite here, wrote:

> "In light of the great respect afforded in *Beacon Theatres,* supra, and its progeny, for a litigant's

right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action. *Beacon Theatres,* supra, makes it clear that had Hill been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case and that the district court erred in granting summary judgment on the issue of liability." 435 F.2d at 64.*

Thus *Rachal,* rather than the conflicting decision of the Court below, is consistent with *Beacon Theatres, Dairy Queen, Meeker* and *Blonder-Tongue* which teach that, in the circumstances of this case, the jury trial right should be upheld and not destroyed by collateral estoppel.

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* Similarly, in *McCook* v. *Standard Oil Co., supra,* the Court balanced the policy favoring an end to litigation against preservation of the strong policy favoring the right to trial by jury and concluded, contrary to the decision below, that where, as here, a court is called upon to apply collateral estoppel in the absence of mutuality, a party should not be estopped where it had had no right to trial by jury in the first action. 393 F. Supp. at 258.

It is respectfully submitted that the conflict between the Second and Fifth Circuits and the uncertainty which that conflict has created as to the scope and importance of the Seventh Amendment jury trial right, justify the grant of certiorari and resolution of the conflict by this Court.

II

The Court below extinguished the jury trial right in derogation of the Seventh Amendment's preservation of that right as it existed in 1791 and contrary to this Court's interpretation of that Amendment.

In denying Petitioners their jury trial right in this action on the basis of non-jury findings made in an SEC enforcement action in which the jury trial right never existed and to which Respondent was a stranger, the Court below reached a result which cannot be reconciled with the Seventh Amendment and this Court's interpretation of it.

While the Court below recognized that, in determining whether a jury trial right exists, it is necessary to ascertain whether such a right existed in 1791 when the Seventh Amendment was adopted, the Court below found that it could not successfully make such an historical inquiry. Thus, the Court below stated that, in respect of actions for damages under the federal securities laws, it could not "by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period." App. A, p. 17a.

To the contrary, a determination can be made as to the jury trial and collateral estoppel rules applicable in the circumstances here. The decisions of this Court demonstrate:

(a) that it is "'a matter too obvious to be doubted'" that a Seventh Amendment jury trial

right does exist in respect of claims for damages brought under post-1791 statutes, *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974); *see Schine* v. *Schine*, [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,552 (S.D.N.Y. 1970); *Richland* v. *Crandall*, 259 F. Supp. 274 (S.D.N.Y. 1966);

(b) that "[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791," *Dimick* v. *Schiedt*, *supra*, 293 U.S. at 476; *see Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935);

(c) that, in 1791, where, as here, there was no mutuality, collateral estoppel could not have been invoked, *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); *Brooklyn City and Newtown R.R. Co.* v. *National Bank of the Republic of N.Y.*, 102 U.S. 14 (1880); *see Mutual Benefit Life Insurance Co.* v. *Tisdale*, 91 U.S. 238 (1876); *Barr* v. *Gratz's Heirs*, 17 U.S. 213 (1819), and, hence, could not -- as was done here -- have extinguished a jury trial right; and

(d) that the jury trial right may not be extinguished by a post-1791 change in the common law doctrine of collateral estoppel. *See Dimick* v. *Schiedt*, *supra*.

In light of these established principles, it is apparent that the Court below had no basis for applying collateral estoppel to extinguish Petitioners' jury trial right. While the Court below noted that the 1791 law courts "respect[ed] decrees and findings in equity" (App. A, p. 18a), it overlooked the fact, relevant here, that, in the absence of

mutuality, those courts refused to give such decrees and findings any estoppel effect. More importantly, the Court below acknowledged the "absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case." App. A, p. 18a.

Nor was there any basis for speculating -- as the Court below did (App. A, p. 17a) -- that the 1791 courts might "perhaps" have created an exception to the mutuality requirement simply because it was the government, here the SEC, which had obtained a prior judgment. No such exception was created by the 1791 courts. *See Mutual Benefit Life Insurance Co.* v. *Tisdale, supra.*

In *Mutual Benefit, supra,* this Court illustrated the principle that a 1791 private litigant, who was a stranger to an earlier-tried action brought by the government, could not invoke the findings made in that action through estoppel in a private action. As this Court wrote:

> "If an indictment for an assault and battery by A upon B is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A upon a subsequent indictment for the same offense; but, if B sues A for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose, it is inter alios acta. B was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefited by it." 91 U.S. at 244.

Moreover, in the very article relied upon by the Court below (App. A, p. 18a), the authors, referring to the state of the law in 1791 in relation to *Rachal* v. *Hill, supra,* wrote:

> "[L]imitations on the doctrine of collateral estoppel—in particular the doctrine of mutuality—would have made it impossible for [plaintiff] to deprive [defendants] of a jury on the issue of liability in an analogous proceeding in 1791 . . ." Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal* v. *Hill,* 85 Harv.L.Rev. 442, 454 (1971).

The fact, noted by the Court below, that relatively recently the common law requirement of mutuality of estoppel has been relaxed in some cases (App. A, p. 8a), cannot affect, let alone extinguish, Petitioners' right to a jury trial here. *See Dimick* v. *Schiedt, supra.* None of those cases involved a question of the jury trial right. In no instance had the jury trial right been denied through any relaxation of the mutuality requirement.*

Indeed, this Court, contrary to the unprecedented result reached by the Court below, has made it crystal clear that the constitutionally preserved right to a jury trial is supreme and cannot be lost through a post-1791 change in a common law doctrine. Thus, in *Dimick, supra,* this Court wrote:

> "It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying

* Collateral estoppel could be applied as to a legal issue in the absence of mutuality only where, unlike the case here, the constitutional right to trial by jury has been satisfied by an opportunity to try that issue to a jury in a prior action. *See e.g., United States* v. *United Air Lines, Inc.,* 216 F. Supp. 709, 729 (E.D. Wash. 1962), *aff'd in part, modified in part on other grounds sub nom. United Air Lines, Inc.* v. *Wiener,* 335 F.2d 379, 404 (9th Cir. 1964).

> conditions. Funk v. United States, 290 U.S. 371. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." 293 U.S. at 487.

In denying Petitioners the benefit of the constitutional principles enunciated in *Dimick*, the Court below relied upon a demonstrably irrelevant difference between the claim asserted in *Dimick* -- a personal injury case -- and the claim here. App. A, pp. 16a-17a. However, since here, as in *Dimick*, the constitutional jury trial right exists, the fact that the claims asserted were different cannot impair the applicability in each case of the constitutional principles enunciated in *Dimick*.

Apparently misapprehending *Dimick* and subsequent decisions of this Court which also have held that the Seventh Amendment jury trial right, as it existed in 1791, "shall be preserved," *e.g.*, *Curtis* v. *Loether*, *supra*, the Court below apparently thought that *Ross* v. *Bernhard*, 396 U.S. 531 (1970), "somewhat weakened" that requirement and could justify its unprecedented denial of the jury trial right as it existed in 1791. App. A, pp. 15a-16a.

It is respectfully submitted, however, that *Ross*, *supra*, did not in any respect "weaken" the requirement of the historical inquiry. Rather, *Ross* simply stated that the historical inquiry happened to be the "most difficult" to apply among three factors bearing upon the question whether a particular issue was " 'legal' " in nature. As this Court, in *Ross*, wrote:

> "Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 n.10.

It is one thing to say, as in *Ross*, that the "required" historical inquiry is difficult; it is an entirely different matter to say, as the Court below did, that because a principle is difficult to apply the principle has been "weakened". *Ross* simply stands for the proposition that an enlargement of the jury trial right beyond its 1791 boundaries is consistent with the Seventh Amendment.*

By its reliance upon *Bloom* v. *Illinois*, 391 U.S. 194 (1968) (App. A, p. 16a), the Court below further evidenced its misunderstanding of the principle that the jury trial right, as it existed in 1791, may not be curtailed. In *Bloom*, which involved a Sixth Amendment jury trial right, this Court enlarged that right to afford it in actions in which it had not existed in 1791. Indeed, in the very passage from *Bloom* quoted below (App. A, p. 16a), this Court contrasted *Thompson* v. *Utah*, 170 U.S. 343 (1898), where, upon an historical analysis, an attempted curtailment of the 1791 jury trial right was held to be impermissible. 391 U.S. at 200 n.2.

It is respectfully submitted that the unprecedented curtailment of the jury trial right by the Court below constitutes a violation of the Seventh Amendment mandate that the jury trial right "shall be preserved." *Dimick* v. *Schiedt*, *supra*. The significance of the error of the Court below is not confined to this case alone. In view of the conflict between the Second and Fifth Circuits, the right to trial by jury has become uncertain in every instance in which the SEC may institute enforcement actions raising the same

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* In enlarging the jury trial right, this Court, in *Ross*, held there was a jury trial right in a stockholders' derivative suit for damages, though such actions were traditionally cognizable only in equity and, consequently, had not been triable to a jury as of right.

issues as are raised in related private litigation. *Securities and Exchange Commission* v. *Wills*, [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,321 (D.D.C. 1978); *see also Securities and Exchange Commission* v. *Commonwealth Chemical Securities, Inc.*, No. 76-6175 (2d Cir. March 3, 1978).

III

The Court below established an unprecedented and demonstrably untenable rule in holding that the constitutional jury trial right in a private action for damages is waived if such action cannot be expedited and tried prior to the trial of a related SEC enforcement action.

Notwithstanding the fact (a) that a right to trial by jury did not exist in the SEC enforcement action and (b) that, at the time the trial of that action was ordered, this action was not ready for trial, the Court below concluded that the Seventh Amendment jury trial right in this action had been waived. App. A, pp. 14a, 18a-19a. Respondent certainly did not claim, and the District Court did not find, any such waiver. That question was first raised by the Court below, which did so on demonstrably untenable grounds.

Thus, the Court below ruled that Petitioners -- who were the only defendants in the SEC action but are only two of the 14 defendants named in this action -- should have "sought to expedite trial of the present action" to preserve their jury trial right. App. A, p. 14a. However, the trial of this action could not have been so expedited to avoid a prior non-jury determination of the common issues. The ruling not only was wholly unrealistic in light of the procedural posture of each of the cases, but also does violence to the well-established policy requiring SEC enforcement actions to be tried without being delayed by private litigation.

The SEC action was commenced on May 5, 1976 and the trial thereof was ordered to commence on June 2, 1976. At that time, pre-trial discovery in this action was far from complete. There would have been no way, in the four weeks between the commencement and the trial o the SEC action, for the parties to this action to have prepared for, and proceeded to, trial. This is to say nothing of the fact that Respondent's May 20, 1976 motion to amend his complaint in this action was not decided until September 3, 1976, months after the trial in the SEC action had been concluded.

Nor could Petitioners have stayed the trial of the SEC action until after this action was made ready for trial and tried. *Securities and Exchange Commission* v. *Wills, supra; see Securities and Exchange Commission* v. *Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972); *Securities and Exchange Commission* v. *General Host Corp.*, 60 F.R.D. 640 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 1332 (2d Cir. 1975); *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 59 F.R.D. 305 (D.D.C. 1973).

In *Wills, supra*, defendants, relying upon the decision below, sought to preserve their jury trial right in certain private actions by moving for a stay of the trial of a related SEC enforcement action until after the trials of the private actions. In *Wills*, as was the case here, the private actions were not ready for trial at the time the SEC action was ordered to trial. The Court, finding that Congress had

intended that SEC actions should proceed unobstructed by private litigation, denied the motion. The Court wrote:

> "The SEC is charged with statutory responsibility to vindicate the public interest. It perceives the threat of future violations and moves to prevent them. Congress was at pains to make it abundantly clear that the Commission in such circumstances should proceed unobstructed by private litigation. *See, e.g.*, S. Rep. No. 94-75, 94th Cong., 1st Sess. 76-77 (1975). The Commission is ready, discovery is completed, a trial date is set, and the case will proceed with trial to the Court." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at p. 93,072.

In *Everest Management, supra,* the Second Circuit also refused to delay an SEC enforcement action even to permit intervention by parties claiming to have been defrauded in the very transaction complained of by the SEC. There, Judge Timbers, a member of the Panel below, wrote:

> "Appellants argue, accordingly, [on the basis of *Rachal* v. *Hill, supra*] that, unless intervention in the present SEC action is permitted, a total relitigation of the issues would be required in a subsequent action.
>
> "Suffice it to say that in our view it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." 475 F.2d at 1240 n.5.

The same policy was sounded in *General Host, supra,* where the Court stated:

> "'As a matter of general policy, it is undesirable that SEC actions for injunctive relief, whose sole purpose is the expeditious safeguarding of the public interest, be subjected to the delays that are inherent in private litigations, with their different concerns, even where those private actions parallel the SEC complaints.'" 60 F.R.D. at 641-42.

It is thus apparent that there was no merit whatsoever to the unprecedented and untenable rule established by the Court below that to avoid waiver of the jury trial right in a private action, such action must be expedited and tried prior to the trial of a related SEC action.

IV

The Court below established an unprecedented and futile requirement that to avoid waiver of the jury trial right in a private action for damages it is necessary to request a jury in a related SEC enforcement action in which there is no jury trial right.

The Court below also ruled that to avoid waiver of their jury trial right in this action Petitioners should have requested Judge Duffy, who tried the SEC enforcement action, to exercise his discretion, pursuant to Rule 39(b), Fed.R.Civ.P., to order the issues in that action tried to a jury. App. A, p. 14a. Such a suggestion is demonstrably untenable. The futility of the suggestion is underscored by *Wills, supra,* and *Commonwealth Chemical, supra,* which held such a request to be groundless.

A jury trial under Rule 39(b) could not have been properly demanded in the SEC enforcement action. Rule 39(b) is expressly limited to "an action in which such a [jury] demand might have been made of right", and there certainly was no such right in the SEC enforcement action. *Securities and Exchange Commission* v. *Commonwealth Chem-*

ical Securities, Inc., supra; Securities and Exchange Commission v. *Wills, supra; Securities and Exchange Commission* v. *Associated Minerals, Inc.*, 75 F.R.D. 724 (E.D. Mich. 1977); *Securities and Exchange Commission* v. *Petrofunds, Inc.*, 420 F. Supp. 958 (S.D.N.Y. 1976). A jury demand under Rule 39(b), suggested by the Court below, would have been improper.

The confusion which the decision below has engendered may also be seen in the fact that while the decision below suggested that a jury demand should have been made in the SEC enforcement action, subsequently the Second Circuit, in *Commonwealth Chemical*, held that a jury trial right did not exist in such an action.

V

The Court below ruled erroneously that the use of an advisory jury could satisfy a Seventh Amendment jury trial right.

The further ruling of the Court below that to avoid waiver of their jury trial right in this action Petitioners should have requested an advisory jury in the SEC action, pursuant to Rule 39(c), Fed.R.Civ.P., (App. A, p. 14a) was also erroneous. An advisory jury could have had no bearing whatsoever upon Petitioners' Seventh Amendment jury trial right. *Securities and Exchange Commission* v. *Wills, supra.* "By its nature, the function of the advisory jury is to enlighten the conscience of the trial court and the jury's verdict has no binding effect upon that court." 5 *Moore's Federal Practice* ¶ 39.10[3] (2d ed. 1977); *Mallory* v. *Citizens Utilities Company*, 342 F.2d 796 (2d Cir. 1965); *(American) Lumbermens Mutual Casualty Co. of Illinois* v. *Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir. 1939).

In *Wills*, the Court, addressing the same suggestion made by the Court below regarding the use of an advisory jury, wrote:

> "The suggestion that an advisory jury might be used is, on analysis, misplaced. Defendants want to protect a perceived constitutional right to jury trial, but an advisory jury does not satisfy this right." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at pp. 93,072-73.

Moreover, even where an advisory jury is used, the facts are to be found by the court, Rule 52(a), Fed.R.Civ.P., and the "review on appeal is from the court's judgment as though no jury had been present." *(American) Lumbermens Mutual Casualty Co. of Illinois* v. *Timms & Howard, Inc., supra,* 108 F.2d at 500.

It is respectfully submitted that, contrary to the ruling of the Court below, to substitute for a jury, which a party has as of constitutional right, an advisory jury, whose fact-finding is neither binding nor subject to review, would render the constitutional right illusory. Clearly, there could be no waiver of a Seventh Amendment jury trial right merely because a request is not made for an advisory jury.*

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* While the Court below relied on *Goldman, Sachs & Co.* v. *Edelstein*, 494 F.2d 76 (2d Cir. 1974), that case cannot support the conclusion of the Court below that trial of the SEC enforcement action, without objection by Petitioners, resulted "in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues". App. A, p. 19a. To the contrary, as has been seen, there were no valid grounds upon which to object to the trial of the SEC action, and, as seen in *Wills, supra,* any objection would have been fruitless. *Goldman, Sachs* in no respect has any relevance to the circumstances here. Unlike the SEC action here, in which the jury trial right had never existed, *Goldman, Sachs* involved waiver of a jury trial in a private action where such right had existed.

VI

The decision below raises significant and recurring problems regarding conflicting considerations of the efficient adjudication of SEC enforcement actions and the preservation of the jury trial right in related private actions.

The effect of the decision below is to place a defendant, which is party to both an SEC enforcement action and a related private action, in an untenable position if, as is the case here, the defendant wishes to preserve its constitutional jury trial right in the private action. Brodsky, *The Frustration of Private Counsel: Uncertainties Favor The Commission,* 178(116) N.Y.L.J. (12-19-77) p. 48; Mathews and Thompson, *SEC Enforcement Program: Emphasis on Perquisites Highlights Year's Actions,* 178(116) N.Y.L.J. (12-19-77) pp. 45-46. While this problem arises here in the context of SEC enforcement actions, it would also arise in analagous situations involving other agencies of the government.

As has been seen, in keeping with the purpose of an SEC enforcement action to safeguard the public interest, delay is not to be countenanced. *E.g., Securities and Exchange Commission* v. *Wills, supra.* Thus, a defendant in an SEC action cannot stay that action to enable a related private action to be tried first.* Accordingly, the defendant faced with an SEC action and a related private action is left with two choices, each of which would create an obvious injustice in view of the constitutional right at stake.

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* The apparent effect of the suggestion of the Court below that this action should have been expedited for trial prior to the trial of the SEC action is in conflict with the policy to have SEC enforcement actions proceed unobstructed by related private litigation. Thus, in the circumstances here, the only way to have tried the private action prior to the SEC action would have been through a stay of the SEC action - - but, as seen in *Wills,* such a stay would not be available.

The first choice is to contest the SEC action. However, by doing so, according to the Court below, the defendant exposes itself to the risk of an adverse determination which would extinguish its constitutional jury trial right in the private action.

The other choice is to settle the SEC action to avoid a trial and thereby prevent the possibility of an adverse determination. However, to force a defendant to settle one action, in which it has no jury trial right, in order to preserve its constitutional jury trial right in a second action, would be inconsistent with the Seventh Amendment's preservation of that right. Moreover, to place a defendant in such a position is to give the SEC, at a time when its allegations are as yet unproven, unfair and unwarranted leverage in dictating settlement terms to a defendant intent on preserving its jury trial right.

In this regard, the Brodsky article, *supra,* after discussing various areas of uncertainty in SEC litigation, stated:

> "Thus, in SEC injunction actions the Commission is now armed with an additional argument in its powerful array of arguments to persuade targets of investigations to settle with them—namely, that even if no injunction is mandated, the court may issue findings and direct that public disclosure material be corrected. If it does, those findings will be binding, at least in the Second Circuit, in a private action for damages." Brodsky, *supra,* 178(116) N.Y.L.J. (12-19-77) at p. 48, col. 5.

Similarly, the Mathews and Thompson article, *supra,* observed:

> "*Shore* on its face is a great boon for class action plaintiffs—at least those who are able to bring their cases in the Second Circuit. The decision may also benefit the SEC's enforcement program. Po-

tential SEC defendants are less likely to resist settlement and to force the SEC to trial knowing that the strike suitors waiting in the wings will be able to ride the coattails of the SEC's substantial trial preparation and presentation efforts." Mathews and Thompson, *supra*, 178(116) N.Y.L.J. (12-19-77) at p. 46, col. 1.

In sum, the decision below places defendants in private actions under the federal securities laws in the Second Circuit, unlike defendants in such actions in the Fifth Circuit, in a position which either does violence to their Seventh Amendment jury trial right or may force them to refrain from contesting allegations they deny in related SEC enforcement actions.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 49—September Term, 1977.

(Argued September 12, 1977 Decided November 1, 1977.)

Docket No. 77-7163

LEO M. SHORE,

Plaintiff-Appellant,

—against—

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY COMPANY, INC., and HERBERT N. SOMEKH,

Defendants-Appellees.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,* and DOOLING, *District Judge.**

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Interlocutory appeal by plaintiff pursuant to 28 U.S.C. §1292(b) from an order of the Southern District of New York, Inzer B. Wyatt, *Judge,* in a stockholders' class action for damages against corporate officers and directors alleging issuance of false proxy statement in violation of §14(a) of the Securities Exchange Act of 1934, which denied plaintiff's motion for summary judgment against two defendants (Parklane Hosiery Company, Inc. and Herbert N. Somekh) based on the ground that they were collaterally estopped from denying adverse findings made by the district court in a prior action against them that had been affirmed on appeal, see *SEC* v. *Parklane Hosiery Co., Inc. and Herbert N. Somekh,* 422 F. Supp. 477 (S.D.N.Y.), *aff'd.,* 558 F.2d 1083 (2d Cir. 1977).

Reversed.

Samuel K. Rosen, Esq., New York, N.Y. (Stuart D. Wechsler, Esq., Patricia I. Avery, Attorney, Kass, Goodkind, Wechsler & Gerstein, New York, N.Y., of counsel), *for Plaintiff-Appellant.*

Irving Parker, Esq., New York, N.Y. (Joseph N. Salomon, Esq., Norman Trabulus, Esq., Jacobs Persinger & Parker, New York, N.Y., of counsel), *for Defendants-Appellees.*

Mansfield, *Circuit Judge:*

This appeal raises the important question of whether a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the

same issues of fact arising out of the same transaction. We hold that it is collaterally estopped from doing so.

In November 1974 the present class action was commenced on behalf of stockholders of Parklane Hosiery Company, Inc. ("Parklane") against Parklane and 12 of its officers, directors and stockholders, alleging that a proxy statement issued by them on September 24, 1974, contained materially false and misleading statements in violation of §§10(b), 13(a), 14(a) and 20(a) of the Securities Exchange Act of 1934 as amended, and rules and regulations promulgated thereunder. Parklane had been a publicly-held company engaged in the retail sale of women's apparel, 71.68% of whose outstanding shares were controlled by the defendants. In furtherance of a proposed merger whose purpose was to convert Parklane into a privately-owned company controlled entirely by defendants, they caused a proxy statement to be sent to Parklane's stockholders in September advising that on October 14, 1974, there would be a meeting to consider the proposal. Following the meeting the plan was consummated. Parklane merged with New PLHC Corp., a private company controlled by defendants, and each of the minority stockholders, including plaintiff, was paid $2 per share for his holdings, subject to the right of any dissenting stockholder to obtain an appraisal pursuant to the New York Business Corporation Law.

The Amended Complaint alleges that the proxy statement

> (1) failed to disclose that the purpose of the merger was to help defendant Herbert N. Somekh, Parklane's president, to meet his personal obligations rather than to further any valid corporate objective;
>
> (2) failed, in referring to Parklane's termination of negotiations with respect to its lease of certain property from the Federal Reserve Board of New York,

to reveal that continuation of the negotiations could result in substantial financial benefits to Parklane; and

(3) failed to disclose, in advising that two appraisers had been employed by Parklane to determine the fair value of its stock, that the appraisers had not been furnished with sufficient information to prepare a true and complete valuation.

It further alleges that the distribution of the proxy statement was part of a fraudulent scheme giving rise to liability to the plaintiff and other members of the class pursuant to Rule 10b-5 of the Securities Exchange Act of 1934. The complaint seeks damages, a rescission of the merger, costs and such other relief as might be granted by the court.

In May 1976, about a year and a half after commencement of the present action, the Securities and Exchange Commission ("SEC") brought suit in the Southern District of New York against Parklane and Somekh, alleging that their issuance of the September, 1974, proxy statement violated §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), and §§10(b), 13(a), and 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§78j(b), 78m(a) and 78n(a), and rules promulgated thereunder. The SEC charged that the proxy statement was materially false and misleading in essentially the same respects as those that had been alleged by the plaintiff in this action. The SEC sought equitable relief, including the appointment of a special counsel to determine the fair value of the Parklane shares held by the minority stockholders eliminated by the merger and an injunction against further violations by the defendants of the antifraud, proxy and reporting provisions of the federal securities laws. After a trial in which the SEC's application for preliminary injunctive relief was consolidated with trial of the action

on the merits pursuant to Rule 65(a), F.R.Civ.P., and both Parklane and Somekh were accorded a full and fair opportunity to adduce evidence and cross-examine witnesses produced by the SEC, Judge Kevin T. Duffy of the Southern District of New York on November 9, 1976, filed a 26-page opinion which constituted his findings of fact, conclusions of law and final order in the case.

In his decision Judge Duffy, after noting the pendency of the present action and analyzing the evidence before him, found (1) that the September 24, 1974, proxy statement failed to disclose that the "overriding purpose for the merger was to enable Somekh to repay his personal indebtedness," (2) that the proxy statement was also false in stating that there were "no negotiations at present" with the Federal Reserve Board of New York with respect to cancellation of Parklane's lease of property from the Board when in fact negotiations were continuing in early October 1974 and the Federal Reserve Board's representative had agreed to recommend payment of $1,200,000 to compensate for the loss caused by the cancellation, of which $300,000 would be payable to Parklane as its share, and (3) that the proxy statement was misleading in that it failed to disclose that the appraisers, Thomson & McKinnon, Auchincloss & Kohlmeyer, Inc., had not been informed of certain facts pertinent to their evaluation of Parklane shares, including Somekh's plans to use $1 million of corporate assets to reduce his personal indebtedness, his intentions to sell certain real property to Parklane and of the negotiations with the Federal Reserve Board with respect to cancellation of the leasehold. Judge Duffy further found, on the basis of his detailed discussion of the evidence before him, that each of these three false statements or non-disclosures was material under the standard established by the Supreme Court in *TSC Industries, Inc.* v. *Northway*, 426 U.S. 438 (1976). See also *SEC* v. *Texas*

Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Although the district court concluded in the SEC case that the defendants had violated §14(a) of the Exchange Act of 1934, it decided that the requested relief—an injunction and appointment of a special counsel to determine the fair value of the Parklane shares—would not be appropriate and limited relief to a direction that Parklane amend its prior filings with the SEC to correct the misstatements and non-disclosures and file a Form 10K for 1975, if one had not been filed. Judge Duffy's decision was affirmed by us on July 8, 1977, see 558 F.2d 1083, in an opinion specifically upholding each of his findings and his determination that each of the misstatements or omissions was material.

On the basis of the district court's November 9, 1976, decision plaintiff in the present action moved on November 24, 1976, for summary judgment against Parklane and Somekh, contending that by reason of Judge Duffy's detailed findings of fact, those two defendants were collaterally estopped from asserting that any genuine issues of material fact regarding liability remained for trial. The motion was denied by Judge Inzer B. Wyatt in a cryptic opinion as follows: "The within motion is denied. *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970). So ordered."

In *Rachal* the Fifth Circuit was faced with the question before us—whether corporate officers who have had issues of fact determined against them in a non-jury trial of an SEC suit for injunctive relief are collaterally estopped from relitigating those issues before a jury in a subsequent class and derivative action for damages brought by stockholders. The court, conceding that mutuality of parties was no longer a prerequisite for collateral estoppel, nevertheless held that the Seventh Amendment right to a jury trial of contested issues of fact survived any prior non-

jury adjudication, relying principally on the Supreme Court's decision in *Beacon Theatres Inc.* v. *Westover*, 359 U.S. 500 (1959).

Following his decision Judge Wyatt certified his order pursuant to 28 U.S.C. §1292(b). Since it involved a controlling question, we permitted an interlocutory appeal in the interests of avoiding a wasteful and unnecessary trial, see F.R.A.P. 5(a). We reverse.

Discussion

Absent a demand for a jury trial in the present action, it is clear that Parklane and Somekh would be collaterally estopped from relitigating the issues resolved against them in *SEC* v. *Parklane Hosiery Co., Inc. and Herbert N. Somekh*, 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd.*, 558 F.2d 1083 (2d Cir. 1977). The issues in both proceedings are identical, and the defendants were accorded a full and fair opportunity to try those issues in the prior proceeding.

That the prior proceeding was equitable in nature has never been considered a ground for denying collateral estoppel or res judicata effect in a court of law to the findings or judgment of a court of equity, even before merger of the law and equity systems, *Katchen* v. *Landy*, 382 U.S. 323, 337-38 (1966); *Brady* v. *Daly*, 175 U.S. 148, 159 (1899); *Smith* v. *Kernochen*, 48 U.S. (7 How.) 198 (1849); *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 343 (2d Cir. 1973); see Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases, A Comment on Rachal* v. *Hill*, 85 Harv. L. Rev. 442, 450-54 (1971); Restatement of Judgments §68, Comment j (1942). Although the plaintiffs in the two proceedings differ and mutuality of parties was at one time a prerequisite for application of the doctrine of collateral estoppel, see *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912),

this court in *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2d Cir. 1964), following the lead of Justice Traynor in *Bernhard* v. *Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942), dispensed with mutuality as a requirement, taking the view that a requirement of complete identity of parties serves no purpose as long as the person against whom the findings are asserted or his privy has had a full and fair opportunity to litigate the identical issue in the prior action. Any lingering doubt in the matter was eliminated by the Supreme Court's decision in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), where the Court, citing *Zdanok* and *Bernhard* with approval, unanimously concluded that a determination of patent invalidity against a party in prior litigation was binding against it in a subsequent suit to enforce the patent against others.[1]

Turning to the question of whether, notwithstanding the doctrine of collateral estoppel, the defendants are entitled to relitigate the same issues of fact before a jury, it must be recognized that the Seventh Amendment[2] does not create new jury trial rights. It simply preserves the right to a

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1 Prior to *Blonder-Tongue*, the Supreme Court in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), had held that when an administrative agency acts in a judicial capacity, collateral estoppel effect may be given to its findings of fact against the respondent rather than require relitigation in subsequent legal proceedings, 384 U.S. at 421-22. This principle has since been applied to give such effect to agency determinations in later private damage suits against the respondent. See *H.L. Robertson & Assoc. Inc.* v. *Plumbers Local No. 519*, 429 F.2d 520, 521 (5th Cir. 1970); Comment, Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel and Jury Trial, 43 U. Chi. L. Rev. 338, 356 (1976).

2 The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

jury trial as it existed in 1971, 5 Moore, Federal Practice ¶38.05[5], at 82-83 (2d ed. 1974). Moreover, the right to a jury trial exists only in "suits at common law" rather than those in equity, see *Ross* v. *Bernhard*, 396 U.S. 531 (1970), and only with respect to disputed issues of fact. *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-20 (1902). Where no genuine issue of material fact exists, the court may, without violating Seventh Amendment rights, grant summary judgment pursuant to Rule 56, F.R.Civ.P. E.g., *Diamond Door Co.* v. *Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974); *United States* v. *Stangland*, 242 F.2d 843, 848 (7th Cir. 1957). Similarly the court may, consistently with the Seventh Amendment, withdraw a case from the jury and order the entry of a directed verdict where the evidence, viewed most favorably to the party against whom the judgment is entered, would not be sufficient to support a verdict in that party's favor. Rule 50, F.R.Civ.P.; *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654 (1935). Failure to make a prompt demand for a jury constitutes a waiver of the right to one. Rule 38(d), F.R.Civ.P.

Since the Seventh Amendment preserves the right to a jury trial only with respect to issues of fact, once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury. The party seeking the retrial has already exercised his right to be heard on the issues and to cross-examine witnesses with respect to them. The interests of finality, certainty and economy of judicial resources then come into play to preclude his relitigating the same issue a second or third time, with the possibility of inconsistent findings, absent some showing of fundamental unfairness in the prior proceeding or some unusual circumstances such as fraud that would render inappropriate the application of the doctrine of collateral estoppel. See *Commissioner*

v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sacramento*, 94 U.S. 351 (1876).

Apparently accepting these fundamental principles, appellees rely, as did the district court, on the Fifth Circuit's decision in *Rachal* v. *Hill, supra,* for the proposition that they are nevertheless entitled to a second trial of issues once determined, this time before a jury. In reaching that conclusion the court in *Rachal* rested its decision almost entirely upon its interpretation of *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). That case, however, did not deal with the question of whether a party has a right under the Seventh Amendment to a jury retrial of issues already adjudicated in a non-jury proceeding, but with the scope of a judge's discretion in determining the order or sequence in which legal and equitable claims joined in the same action under the liberal federal rules, which merge law and equity, see Rule 18, F.R.Civ.P., and mandate the assertion of compulsory counterclaims, see Rule 13, F.R. Civ.P., must be tried. Plaintiff in *Beacon Theatres* brought an action seeking a declaratory judgment and injunctive relief against the institution of a treble damage antitrust suit, to which the defendant responded by interposing a compulsory counterclaim for treble damages raising the same issues and demanding a jury. Were the equitable claims tried first to the court, the defendant would have been precluded under the doctrine of collateral estoppel from relitigating issues common to the two claims in a trial before a jury to which the defendant was entitled under the Seventh Amendment. Recognizing this alternative, the Supreme Court held that it was an abuse of discretion for the district court to schedule the equity claims first for trial.

The Court in *Beacon Theatres* was not required to face the question of whether, once there has been a prior non-jury trial of the issues without objection in an independent

equity proceeding, as was the case here, the losing party may then demand a jury retrial of the same issues. However, as we noted in *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 342 (1973), the Supreme Court's concern over which of the claims should first be tried, rather than evidencing support for such procedure, was based on the assumption that unless the jury trial was held first the findings in the non-jury proceeding would be conclusive. Indeed, even with respect to the order of presentation of legal and equitable claims, Justice Black indicated in *Beacon Theatres* that there might be some exceptional instances where a court, in the exercise of its discretion, would be justified in permitting the issues to be resolved first in the equity proceeding even though this could result in precluding a jury trial, stating:

> "If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510 (footnote omitted).

Thus *Beacon Theatres* simply asserts that where parties join legal and equitable claims arising out of the same transaction, the court must schedule the sequence of trials to protect a party's constitutional right to a jury trial.[3]

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3 Three years later the Court extended the principles of *Beacon Theatres* to hold in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), that where

However, we do not view the decision as compelling the result reached in *Rachal*. If anything, *Beacon Theatres* implicitly confirms the long-accepted principle that a non-jury adjudication of issues asserted in an equitable claim will collaterally estop a later jury trial of the same issues presented by the same party in a legal claim. Had it not been for that basic assumption the Supreme Court would not have been concerned about the order in which the legal and equitable claims were to be tried, since the defendant would then have been guaranteed a jury trial of the counterclaim regardless of the outcome of the equitable claim. As Justice Black noted in his majority opinion, if the common issues were first resolved by the district court upon a non-jury trial of the complaint for declaratory relief

> "the effect of the action of the District Court could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,' for determination of the issue of clearances by the judge might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.' 252 F.2d at 874." 359 U.S. at 504.

This underlying premise was equally implicit in *Dairy Queen Inc.* v. *Wood*, 369 U.S. 469 (1962), and *Meeker* v. *Ambassador Oil Corp.*, 375 U.S. 160 (1963). It was later confirmed in *Katchen* v. *Landy*, 382 U.S. 323, 336-40 (1966), where the Court upheld the right of a bankruptcy trustee to recover a preference through a summary proceeding, for which a jury is not required, over the objection that

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a plaintiff joined demands for injunctive relief and damages in one suit, the defendant who made a timely demand for a jury could not be deprived of his constitutional right to a jury trial by earlier resolution of the issues with respect to the equitable claim.

this procedure would deprive the claimant of his right to a jury trial, to which he would be entitled under the Seventh Amendment in a plenary proceeding under §60 of the Bankruptcy Act, 11 U.S.C. §96; *Schoenthal* v. *Irving Trust Company*, 287 U.S. 92, 94-95 (1932). *Katchen* stated:

> "In practical effect, the denial of a jury trial would be no less were the bankruptcy court merely to determine the existence and amount of the preference, since that determination would be entitled to *res judicata* effect in any subsequent plenary action. And we have held that equity courts have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies.
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> • • • • •
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> "For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled. . . . Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. 338, 339-40.

In view of the limited scope of the Supreme Court's decision in *Beacon Theatres* and its inherent respect for the doctrine of collateral estoppel, we do not view the case, either in logic or in spirit, as requiring us to hold that after a litigant has had a full and fair non-jury trial of issues he may always invoke the Seventh Amendment to obtain a second trial of the same issues. To so hold would violate basic principles of fairness, finality, certainty, econ-

omy in utilization of judicial resources,[4] avoidance of possibly inconsistent results, and achievement of the "just, speedy and inexpensive determination of every action," Rule 1, F.R.Civ.P.[5] Were there any doubt about the matter, it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting Judge Duffy, in the exercise of his discretion pursuant to Rule 39(b), (c), F.R. Civ.P.,[6] to order that the issues in the SEC case be tried by a jury or before an advisory jury. Thus, to the extent that foreseeability of the possible use of collateral estoppel in a later private action for damages is a factor in

4 Although plaintiffs have joined with Parklane and Somekh in the present suit other persons who were not parties to the SEC proceeding, they advised the district court that, in the event their summary judgment motion was granted, they would drop their suit against the others, terminating the litigation altogether except for damages.

5 As Justice White observed in *Blonder-Tongue, supra,* the fundamental question is "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," 402 U.S. a 328, a question which the Court answered in the negative.

6 Rule 39 provides in pertinent part:

"(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

"(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

determining whether application of estoppel principles would be unjust,[7] see *The Evergreens* v. *Nunan,* 141 F.2d 927, 929 (2d Cir.), *cert. denied,* 323 U.S. 720 (1944), no unfairness exists in the present case, because the defendants, being parties to two suits pending at the same time, were fully aware of the estoppel consequences.

Notwithstanding the Supreme Court's respect for the doctrine of collateral estoppel, defendants urge that their right to a jury trial under the Seventh Amendment must be preserved on historical grounds. Frankly conceding in their brief that if there had been mutuality of parties "the application of collateral estoppel could result in the loss of a jury trial right" (Appellees brief p. 15), they argue that since principles of non-mutual estoppel had not yet evolved in 1791, they must be disregarded in construing a constitutional amendment which preserves the right to a jury trial at common law as it then existed. In support of this position they point to *Dimick* v. *Schiedt,* 293 U.S. 474 (1935), where the Court looked to custom governing the right to a jury in 1791 to determine whether a personal injury plaintiff could be forced to accept a court's increased award of damages after a jury verdict had been found inadequate or whether the plaintiff was entitled to a new jury for the assessment of damages as a matter of constitutional right. Such a strict historical approach to the Seventh Amendment, which would freeze the jury trial at

7 It has been observed that

"Since one of the major functions of injunctive actions brought by the Commission is the alerting of potential private plaintiffs to actionable violations of the securities laws, the defendants should be well aware of the possibility of multiple private suits at a later date. Thus, it is unlikely that the defendants would regard the injunction as unimportant and therefore fail either to defend the first suit vigorously or to appeal an adverse judgment." (Footnotes omitted). Comment: The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal v. Hill, 71 Colum. L. Rev. 1329, 1338-39 (1971).

its 1791 level—no more, no less—has been somewhat weakened by recent pronouncements. See, e.g., *Ross* v. *Bernhard*, 396 U.S. 531 (1970), where the Court found that because of the "extensive and possibly abstruse historical inquiry" involved, such an analysis is "most difficult to apply." 396 U.S. at 538, n.10. The inquiry into pre-1791 practice is complicated by the paucity of precedent and the merger of law and equity, see The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 175-76; McCoid, Procedural Reform and The Right to a Jury Trial: A Study of Beacon Theatres Inc. v. Westover, 116 U. Pa. L. Rev. 1 (1967). Since the term "Suits at common law" as used in the Seventh Amendment does not embrace equitable claims, it becomes necessary to determine, with respect to rights and remedies arising out of statutes that were not in existence in 1791, what the closest common law analogue might have been, which is often a tenuous procedure at best. See Note, *United States* v. *J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), 88 Harv. L. Rev. 1035, 1041-42 (1975); Note, Congressional Provision for Nonjury Trial under the Seventh Amendment, 38 Yale L.J. 401, 418 (1973). As the Supreme Court said more recently in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), in determining whether a Sixth Amendment right to trial by jury existed in criminal contempt proceedings, "the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution. Cf. *Thompson* v. *Utah*, 170 U.S. 343, 350 (1898)." 391 U.S. at 200 n.2.

In any event, application of a strict historical standard would not mandate a jury retrial of the present case, which is distinguishable in significant respects from *Dimick*. That case involved a suit for damages for personal injuries of

the common garden-variety type that had long existed at common law prior to 1791 and had always been triable by jury. Moreover, the pre-1791 law clearly prohibited the Court from increasing a jury award in such a case, 293 U.S. at 482. In the present case, on the other hand, we find no 18th century counterpart or analogue to an SEC proceeding for injunctive relief or a stockholders' suit based on an implied right of action created by antifraud provisions of federal securities laws. We therefore cannot, by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period in such suits if these statutes of recent vintage, which contemplated both public and supplementary private enforcement, see *J. I. Case* v. *Borak*, 377 U.S. 426, 432 (1964), had been in effect. Had the 1791 courts been faced with the question, perhaps they, like their 20th century successors, would have decided that the statutory purposes would best be facilitated by permitting private plaintiffs to utilize the SEC-obtained findings and by easing the mutuality requirement accordingly, giving collateral estoppel effect to such findings against a party who had had a full and fair trial of the issues in the case brought by the SEC rather than allow him a second trial before a jury. Moreover, in *Dimick* the trial judge's determination regarding the inadequacy of the verdict (labelled a "compromise" by the Court) was not questioned, and because of its clear inadequacy the plaintiff there, unlike the defendants here, did not receive a fair first trial. Here, in contrast, there was nothing unfair or erroneous about the district court's findings and decision in the SEC proceeding, which have been affirmed by us. See 558 F.2d 1083 (2d Cir. 1977).

In view of these obvious limitations upon a historical inquiry, including the inability to determine what would

have been the precise 1791 boundaries with respect to laws that were not then in existence, much less dreamed of, and the willingness of the law courts even in 1791 to respect decrees and findings in equity, see Shapiro and Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on *Rachal* v. *Hill*, 85 Harv. L. Rev. 442, 451, 454-55 (1971), we should not be confined to a rigid strait-jacket merely because of the lack of a common law analogue and the absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case.

Our disagreement with the Fifth Circuit's decision in *Rachal* should come as no surprise to those familiar with some of our recent decisions bearing on the question presented. For instance, in *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973), we held that a decree in equity had "preclusive effect in a subsequent action at law between the same parties," 490 F.2d at 343. Although *Crane* did not involve non-mutual estoppel, Judge Friendly intimated that the same principles would apply in a non-mutual case to estop the party which had had a full and fair opportunity to litigate the same issues in an equity proceeding, citing with approval the Note by Shapiro and Coquillette, *supra*, which had been highly critical of *Rachal* and stating that "we are not at all sure that *Rachal* was correctly decided," 490 F.2d at 343 n.15. Any doubt on this score was removed in *Goldman, Sachs & Co.* v. *Edelstein*, 494 F.2d 76 (2d Cir. 1974), where, in a mandamus proceeding involving several actions, each of which had asserted the same basic claims by different plaintiffs against a common defendant, we directed that an action in which a jury had been demanded be tried first, "[i]n order to foreclose the potential destruction of the defendant's right to a jury trial" which would occur if one of the non-jury cases presenting the same issues first went to trial and resulted in findings adverse to the defendants. In the

present case that event has occurred, resulting in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues.[8]

For these reasons we reverse the order of the district court and remand the case to it for further proceedings not inconsistent with the foregoing.

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8 Nor is Judge Oakes' dissent in *Goldman, Sachs & Co.* v. *Edelstein*, *supra*, inconsistent with the result reached by us here since Goldman, Sachs took timely steps to protect its right to a jury trial from being destroyed through collateral estoppel by objecting to trial of the non-jury suits until the jury actions against it had first been tried. The dissent was persuaded that under such circumstances collateral estoppel effect should not be given to the findings in a non-jury case if it first proceeded to trial. In the present case, however, no such timely objection was voiced or other steps taken by Parklane or Somekh to protect their right to a jury trial of the issues before the non-jury SEC proceeding went to trial.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges

HON. JOHN F. DOOLING

District Judge

77-7163

LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMERKH, HERBERT N. SOMEKH, as Trustee of Trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE.

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

Docketed as a Judgment #78,416
on January 5, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. JOHN F. DOOLING
District Judge

77-7163

LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY CO., INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellees.

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-seven.

77-7163

LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY CO., INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

against

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Defendants.

The within motion is denied. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970).

So ordered.

s/ INZER B. WYATT
U.S.D.J.

Jan. 14, 1977